United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING EN BANC

76-1384

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Appellee, :

-v- : Docket No. 76-1384

MARIO NAVAS, ESTELLA NAVAS, and JOSE RAMIREZ-RIVERA, :

Appellants. :

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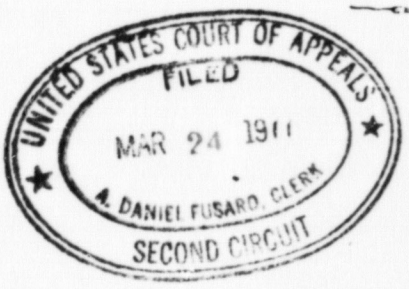
On Appeal From the
United States District Court
For the
Southern District of New York



PETITION FOR REHEARING
WITH A SUGGESTION FOR
REHEARING EN BANC

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PETITION FOR REHEARING
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To The United States Court of Appeals For The Second Circuit:

On March 10, 1977, this Court affirmed appellants' convictions. Appellants submit this petition for rehearing, especially for rehearing en banc, on the speedy trial claim because that claim, crucial to the appeal, is vastly significant overall, and the March 10th decision, if it remains the law, has drastic implications for the speedy trial right.

Because the petition will circulate to judges who did not sit on the original appeal, we summarize briefly the crucial facts which either are not stated in the opinion or are not stated with the prominence necessary to show their significance to the issue. We state these, moreover, in terms of Mario and Estella Navas, although their conclusion has application to Ramirez as well.

State and federal authorities, as the opinion states (Slip. Op. p. 2272), cooperated in the investigation of the Columbian conspiracy here involved. Mario and Estella were among the central figures in the conspiracy, most of the wiretaps upon which the prosecution was based were on their phones (2273), and the extent of their participation was known to both the state and federal authorities, so the notion that the federal authorities needed more time to prepare the case (2283) does not imply to them.

In May and September, 1974, federal and state prosecutors met and entered into agreements as to which forum would take which defendants (2278). Some were taken by both, for example, Sarmiento (2274). Mario and Estella were earmarked solely as state defendants. They were, nonetheless, named as unindicted co-conspirators in the basic federal indictment filed on October 4, 1974, in the first case arising out of the conspiracy (2274 n. 5, 2279), and their activities were described in the overt acts. They were arrested as part of the federal roundup and detained at federal headquarters (2278 n. 8). Evidence showing their involvement was presented at the first Bravo trial. They were not prosecuted federally only because the federal authorities, by agreement, left them to the state prison for eighteen months, but picked them up again in February, 1976, along with the other state defendants as to whom loss of a suppression motion had jeopardized the prosecution (2279).

THERE IS NO BASIS IN POLICY OR PRECEDENT TO SUSPEND SPEEDY TRIAL RIGHTS FOR PROSECUTORIAL CONVENIENCE

The nub of the Court's decision is its policy statement at pages 2280-81, because dual sovereignty, the alleged precedential basis, has nothing to do with the case (2281). We do not suggest that the federal government could not proceed here, which is the sole concern of dual sovereignty. We argue only that given the Sixth Amendment's speedy trial guarantee, the timing could not be of the Government's choosing. That is not a dual sovereignty issue. That is a speedy trial issue.

As to the policy arguments, the opinion sets forth an excellent statement of why it makes sense from a federal prosecutorial standpoint first to cooperate with state authorities and then to defer to them in prosecution, only to pick up defendants later. We know of no reason, however, either in logic or precedent, which suggests that there is an implied exception to the Sixth Amendment's speedy trial guarantee suspending that guarantee in narcotics cases because it makes sense from a prosecutorial standpoint to let the state proceed first. The very notion of such an exception leads to questions of whether there can be any real Sixth Amendment guarantee in this Circuit. Certainly a full Court ought to review the issue before such a result is sealed with finality. Such review need not consider the other points mentioned by the Court because those also have no bearing. An eighteen-month delay while defendants were in state prison pursuant to the federal deference is

surely delay enough (2283) and if that was not prejudicial (2284), it is hard to imagine what was, especially when the Supreme Court has made clear that no particular prejudice beyond the delay (and here the incarceration incident thereto) need be shown. Barker v. Wingo, 407 U.S. 514 (1972).

CONCLUSION

There should be a rehearing en banc. On such rehearing the violation of the Sixth Amendment right should be recognized and the indictment dismissed.*

Respectfully submitted,

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* We rely also on any points raised by co-appellants.

STATE OF NEW YORK)
(SS.:
COUNTY OF NEW YORK)

DONALD E. NAWI, being first duly sworn, on oath certifies and says:

That he is associated with Howard L. Jacobs, P.C., attorney for appellant Estella Navas in this cause; that he makes this certificate in complicance with the rules of this Court; that in his judgment the within and foregoing petition is well founded and is not frivolous or interposed for delay.

Donald E. Nawi
DONALD E. NAWI

(Subscribed and sworn to before me this 23rd day of March, 1977.)

Murray Mogel
Notary Public

MURRAY MOGEL
Notary Public, State of New York
No. 31-7[illegible] in N.Y. Co.
Certificate [illegible] County
Commission Expires March 30, 1978